Editor's note: Appealed -- aff'd, Civ. No. 77-392 (D.Ariz. July 16, 1980)

UNITED STATES
v.
BRADLEY F. DENHAM

IBLA 76-577 Decided March 18, 1977

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring 32 lode mining claims null and void. Contest No. Arizona 8088.

Affirmed.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally-- State Laws

   Under the mining law discovery of a valuable mineral deposit is the sine qua non for a valid mining claim. State mining laws relating to discovery may only add to the federal mining law; such laws cannot diminish the federal requirements for discovery of a valuable mineral deposit on a mining claim located on federal lands.

2. Mining Claims: Hearings--Rules of Practice: Evidence

   Evidence tendered on appeal from an adverse decision in a mining claim contest can only be considered to determine whether a further hearing on the contest should be granted. Where the appellant shows no substantial equitable basis for holding such a hearing and where no substantial expectation appears to exist that such a hearing would produce more conclusive evidence on the issue, a further hearing will not be ordered.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Lode Claims

In determining whether there has been a discovery of a valuable mineral deposit under the mining laws on a lode mining claim factors such as the extent of the mineral deposits, the number of samples assayed showing only a trace of mineral, and the nature of the samples yielding the high values must be considered.

APPEARANCES: Bradley F. Denham, pro se; Demetrie L. Augustinos, Esq., Office of the General Counsel, U.S. Department of Agriculture, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Bradley F. Denham appeals from the March 25, 1976, decision of Administrative Law Judge E. Kendall Clarke, which declared 32 lode mining claims null and void. 1/ Contest proceedings were initiated against Mr. Denham's claims at the request of the United States Forest Service through a complaint filed by the Bureau of Land Management charging (1) that a valid discovery as required by the mining laws of the United States did not exist within the limits of any of the claims; (2) that the land embraced within the limits of the claims was nonmineral in character; and (3) that the claims, excepting the Wonder No. 1, were not marked on the ground so that their boundaries could be readily traced. A hearing was held on January 28, 1975, in Phoenix, Arizona, and a continued hearing was held on May 7, 1975. 2/ Subsequently, Administrative Law Judge Clarke determined that all 32 claims were null and void for lack of discovery of a valuable mineral deposit. Mr. Denham appeals from that decision, contending that his claims are valid.

1/ Those claims are the Blue Feather Nos. 1 through 4; Butterfly Nos. 1 through 10; Bear Butte Nos. 1 through 8; Civix Nos. 1 through 6; Wonder Nos. 1 and 2; Heather Nos. 1 and 2 lode mining claims, situated in part of sec. 6, T. 1 N., R. 9 E.; sec. 36, T. 2 N., R. 8 E.; and sec. 31, T. 2 N., R. 9 E., GSRM, Pinal and Maricopa Counties, Arizona.

2/ The transcript of the January 28, 1975, hearing will be referred to as Tr. I, and the May 7, 1975, hearing's transcript referred to as Tr. II.

[1] Appellant's central contention on appeal is drawn from inferences made in his statement of reasons that he was held to too high a standard regarding the required proof for a valid discovery under the mining laws. Appellant argues that a mineral discovery has been made when a lode explorer finds rock in place containing mineral. Dallas v. Fitzsimmons, 137 Colo. 196, 323 P.2d 274 (1958); Kramer v. Gladding, McBean & Co., 30 Cal. App. 2d 98, 85 P.2d 552 (1938); McShane v. Kenkle, 18 Mont. 208, 44 P. 979 (1896). That mineral, he asserts, need not be of any particular quality or quantity nor does it need to be sufficient to immediately pay mining expenses. Rummell v. Bailey, 7 Utah 2d 137, 320 P.2d 653 (1958); Pitcher v. Jones, 71 Utah 453, 267 P. 184 (1928). Moreover, he argues that, based on the case of Rummell v. Bailey, supra, considerable latitude should be indulged in applying the rules in determining whether there is a sufficient discovery to meet the statutory requirements, since there are few areas of human endeavor where chance plays as important a role as in mining.

None of these cases cited by appellant are controlling in the disposition of this appeal. They represent state law, and

> * * * [s]tate mining laws may only add to the federal mining laws relating to discovery; they cannot diminish the federal requirements for the discovery of a valuable mineral deposit on a mining claim located on federal lands. See 30 U.S.C. § 26 (1970); Belk v. Meagher, 104 U.S. 279, 286 (1881).

United States v. Tappan, 25 IBLA 1, 4 (1976).

The sine qua non for a valid lode mining claim is the discovery of a valuable mineral deposit within the limits of each claim. 30 U.S.C. § 23 (1970); United States v. Arizona Mining & Refining Co., Inc., 27 IBLA 99, 103 (1976); United States v. Tappan, supra at 4; United States v. Zweifel, 16 IBLA 74, 77 (1974). That is, within the limits of each lode mining claim, there must be found a vein or lode of quartz, or other rock in place, bearing mineral of such quantity and quality that a prudent person would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Arizona Mining & Refining Co., Inc., supra; Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912); Castle v. Womble, 19 L.D. 455 (1894).

The United States, when contesting a mining claim, has the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; then the burden of proof shifts to the contestee to show by a preponderance of the evidence that his claims are valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1975); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). It is clear that the mining claimant is the proponent of an order to declare his claim valid. Thus, pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, supra; United States v. Taylor, supra; United States v. Ramsey, 14 IBLA 152, 154 (1974).

The Government presented evidence in this contest revealing that the claims in issue were located by Mr. Denham in 1970 (Tr. I 16-18) and that the area encompassing those claims was withdrawn from further mineral entry on March 1, 1972, as part of the Lost Dutchman Recreation Site. Judge Clarke found that the Government, based on the evidence and testimony submitted by its mineral examiners, Gilbert J. Matthews and Robert E. Wilson, had clearly met its burden of establishing a prima facie case of lack of discovery of a valuable mineral at the time of the withdrawal and after reviewing the evidence, found that Denham had totally failed to preponderate against the Government's prima facie case. 3/

In his appeal, Mr. Denham contests Judge Clarke's findings of fact in two instances, alleging, (1) that Forest Service Mineral Examiner Wilson had stated to him, prior to the withdrawal of March 1, 1972, that the claims were valid and (2) that Judge Clarke erred in his findings regarding some of appellant's assays.

[2] At the hearing on May 7, 1975, Mineral Examiner Wilson testified that he had been familiar with the area encompassed by the appellant's claims since 1958 (Tr. II 99) and that he had examined them in 1970, 1971 and 1972 (Tr. II 91, 95, 98). During his visit in June of 1970, Wilson asserted that he found

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3/ Since Judge Clarke found that no discovery existed when the lands were withdrawn, it was unnecessary for him to consider whether a discovery existed at the times of the hearings. Where no discovery existed at the time the land was withdrawn from mining location, the claims are null and void regardless of a later discovery.

evidence of workings only on the Wonder No. 1 and 2 claims (Tr. II 92, 93), and that on those claims there was insufficient mineralization to constitute a discovery. However, during an examination of the claims in the spring of 1971, Wilson found that appellant had done further work. Wilson testified that he found and sampled some significant mineral showings and that in view of these showings, appellant told him that he was going to do further exploration. Wilson testified that he told the appellant to go ahead and do what he could and that if anything developed, to let him know, so he could come back for another look (Tr. II 97). On his return visits in 1971 and 1972, Wilson testified that the appellant had done additional work, however, Wilson asserted that there was no evidence of any significant mineralization in the existing workings (Tr. II 98-99, Ex. 3). As of the time of the withdrawal, March 1, 1972, it was Wilson's opinion that a prudent man would not have been justified in spending further time and money on the claims with a reasonable expectation of developing a paying mine.

At no time during appellant's testimony at the hearing, did he claim that Wilson told him that his claims were valid, and nothing in the record on appeal supports appellant's claim. Therefore, this assertion, must be considered as additional evidence tendered on appeal.

Additional evidence tendered on appeal from an adverse decision concerning mining claim contests can only be considered in determining whether a further hearing on the contest should be granted. United States v. Taylor, 25 IBLA 21, 25 (1976). Since appellant has shown no substantial equitable basis for holding a new hearing, and since, from the information received on appeal, there appears to be no substantial expectation that a new hearing would produce more conclusive evidence on the issue, we are not disposed to order such a hearing. Id.

[3] Appellant's assertion of error in Judge Clarke's findings regarding some of his assays is:

> That the Administrative Law Judge stated that the assays taken by Mr. Denham could not be of value, therefore only the samples taken by the Gov. were the only ones used, sent to the Gov. testing lab, then ruled on by the Gov. Administrative Law Judge. * * *

Judge Clarke's findings of fact concerning the assays in issue were that:

> Mr. Denham, in his testimony, offered Exhibits G, H, and I which show assays of material which he has stated came from the claims although the samples were not taken by him and he did not know the nature of the sample. Because of the lack of direct knowledge concerning these samples, very little weight can be attached to them in evaluating these claims.

The record on appeal reveals that appellant's Exhibit G was not an assay; however, Exhibits H, I, J, and L were. At the hearing Denham testified that he had not taken the samples for the assay found in Exhibit H, but asserted that he had taken the samples for assay in Exhibits I, J, and L (Tr. I 73-77). Since neither the nature nor the location of the samples taken in Exhibit H is known, Judge Clarke correctly assigned little weight to that assay report. Concerning appellant's Exhibits I, J, and L, Denham's testimony reveals that he took short samplings, 2 to 3 feet long, across the vein in the main pit area of the Wonder No. 1 and 2 claims. Nothing in the record reveals the quantity of the samples taken for Exhibits I and L. Denham estimated that the sample taken for Exhibit J was approximately 5 pounds (Tr. I 77).

With this limited information we are unable to attribute a value to the assay reports in these exhibits, and even if we attribute a high value to them, the evidence of sampling is not representative of the extent of the mineral deposits on the claims. Moreover, both the appellant and the Government have submitted assays which show small to nil mineral values. 4/ The extent of the mineral deposits and the number of samples showing only a trace or no mineral values are factors which must be considered in determining the validity of a discovery on a lode mining claim. United States v. Pruess, A-28641 (August 22, 1961), aff'd Pruess v. Udall, 410 F.2d 750 (9th Cir. 1969), cert. denied, 396 U.S. 967 (1969).

4/ Assays taken on behalf of the appellant, reflecting high values, were submitted during the course of the contest. However, the reason for the high value was due to the existence of a metal called gallium. The record reflects that the existence of this metal was not known by either of the parties to the contest on or before the withdrawal in 1972.

It is implicit for a discovery under the mining laws that the existence of the valuable metals be known; therefore the assay values for the gallium must be disregarded in the determination of whether a discovery existed as of March 1, 1972.

After reviewing Judge Clarke's decision, we find no error in either his application of the law or his factual findings. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman

Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge